**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**

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| PAMELA WOOD and GLENROY WOOD, | ) | |
| Plaintiffs | ) | |
| v. | ) | Docket No. 00-CV-230-B-S |
| ABHE & SVOBODA, INC., | ) | |
| Defendant | ) | |

**ORDER ON DEFENDANT'S MOTION TO DISMISS**

Singal, District Judge.

Before the Court is Defendant's Motion to Dismiss (Docket # 3) and Plaintiffs' Motion to Certify (Docket # 4). Both motions question the applicability of the immunity and exclusivity provisions of the Maine Workers' Compensation Act ("MWCA" or "the Act"), 39-A M.R.S.A §§ 104 & 408, to Plaintiffs' asserted claims. For the reasons stated below, the Court DENIES Plaintiffs' Motion to Certify and GRANTS Defendant's Motion to Dismiss.

I. STANDARD OF REVIEW

A. Motion to Certify

Pursuant to Maine statute, a federal court may certify issues of Maine law to the Maine Supreme Judicial Court when "there are involved in any proceeding before it one or more questions of law of this State, which may be determinative of the cause, and there are no clear controlling precedents in the decisions of the Supreme Judicial Court …." 4 M.R.S.A. § 57; see also Me. R. Civ. P. 76B. Additionally, to qualify for

certification, there must be no dispute regarding the material facts of the case. See Fireman's Fund Ins. Co. v. Childs, 52 F. Supp. 2d 139, 141 (D. Me. 1999).

B. Motion to Dismiss

Generally, a court may dismiss a claim under Fed. R. Civ. P. 12(b)(6) only if it clearly appears that, on the facts alleged, the plaintiff cannot recover on any viable theory. See Gonzalez-Morales v. Hernandez-Arencibia, 221 F.3d 45, 48 (1st Cir. 2000). When considering a motion to dismiss, a court must accept as true all of a plaintiff's well-pleaded factual averments and indulge every reasonable inference in the plaintiff's favor. See Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990). Pursuant to this standard, the Court lays out the facts of the case below.

## II. BACKGROUND

The claims in this case arise from the painting and repair of VLF radio towers at the Cutler Naval Station. The Navy contracted with Abhe & Svoboda, Inc. ("ASI") to perform this work. In turn, ASI employed Pamela Wood ("Wood") to work as a painter.

On August 23, 1998, Wood was working with a painting crew of ASI employees on the towers. While attempting to lower scaffolding to paint the next section of the tower, one member of the crew, David Boutelle, ran into difficulty operating the motorized "man-lift" portion of the scaffolding. Wood attempted to climb down and assist Boutelle. Neither Wood nor Boutelle were wearing the required safety harnesses at this time.

With both Wood and Boutelle in the man-lift, the man-lift suddenly broke away from the tower and dropped approximately 70 feet. Boutelle was thrown from the

manlift and sustained fatal injuries as a result of the fall. Wood remained in the manlift but suffered injuries for which she was hospitalized. Claiming that her injuries have left her permanently disabled, Wood filed for and received workers' compensation benefits from ASI for the injuries she sustained on August 23, 1998.

In February 1999, OSHA concluded its investigation of the August 23rd accident. OSHA cited ASI for fifteen safety violations, seven of which OSHA classified as "serious" and eight of which OSHA considered to be "willful." OSHA assessed a fine against ASI for these violations totaling $385, 000. However, this accident was not the first time OSHA had cited ASI for safety violation. In fact, ASI had committed over 165 documented OSHA violations over 13 years. These violations included numerous serious violations as well as violations for other scaffolding-related injuries. At the Cutler work site in particular, two accidents occurred in 1997. OSHA determined that these 1997 accidents were the result of nine safety violations, eight of which it classified as "serious." As a result of these 1997 accidents, the Navy directed ASI to revise its safety plan and correct unsafe conditions at the Cutler site.

Wood alleges that ASI intentionally and/or recklessly disregarded its duty to correct unsafe conditions and properly train its employees. Specifically, Wood cites ASI's failure to train employees in the rigging, maintenance and movement of the scaffold as well as failure to maintain and provide proper equipment, including independent lifelines and fall-arrest systems. Additionally, Wood claims that her employers failed to employ a competent safety supervisor or anyone to observe and advise crews as they moved the scaffolding. Wood claims that through these failures her

employer deliberately created an "ultra dangerous workplace." (Pls. Resp. at 8 (Docket #3).)

III. DISCUSSION

A. Plaintiffs' Motion to Certify (Docket #4)

Through their Motion, Plaintiffs request that the Court certify the following questions to the Law Court:

> 1. Did the personal injuries sustained by Mrs. Wood arise out of her employment if such injuries were sustained as a result of ASI's deliberate, intentional decision not to abide by mandated federal, state and contractual safety regulations with knowledge that such violations were substantially certain to cause Mrs. Wood's injury or death?
>
> 2. If the answer to [the prior question] is "no", does § 104 of the MWCA exempt an employer from civil action at common law for personal injuries sustained by an employee arising out of employment when such injuries are proximately caused by the employer's deliberate, intended failure to comply with applicable federal, state and contractual safety requirements and, when given the particular circumstances of this case, it was substantially certain that Mrs. Wood would suffer serious injury or death as a result of such intentional misconduct?

(Pls. Mot. to Certify at 4 (Docket #4).)

Despite Plaintiffs' arguments to the contrary, the Court finds that there are clear controlling precedents from the Law Court that answer these questions. See, e.g., Searway v. Rainey, 709 A.2d 735, 736 (Me. 1998) (concluding the exclusivity provisions of the MWCA barred claim for assault when employer allegedly assaulted employee on the job site); Li v. C.N. Brown Co., 645 A.2d 606, 608 (Me. 1994) (concluding that MWCA applied to "all work-related injuries and deaths, however caused, not just accidental injuries and deaths"). Plaintiffs argue that the facts of this case distinguish it from Searway and Li and, therefore, the Law Court might reach a different conclusion in this case. Specifically, Plaintiffs claim in this case that the employer "intentionally

maintained dangerous conditions to save money with the knowledge that injuries and/or fatalities were certain to occur." (Pls. Reply at 3 (Docket #7).) However, the Court concludes that the facts of this case place it squarely between the facts of Li, where the employer "intentionally place[d] employees in harms way" thereby allowing them to be victims of an armed robbery, and the facts of Searway, where the employer assaulted his employee during a work-related argument. Li, 645 A.2d at 608. See Searway, 709 A.2d at 736.

Additionally, Plaintiffs argue that "the intentional torts [they allege] cannot be said to arise out of employment." (Pls. Reply at 3 (Docket #7).) However, as the Law Court recently explained, "[W]e have said that an injury arises out of employment when, in some proximate way, it has its origin, its source, or its cause in the employment. … 'Arising out of employment' means that the injury must have a causal connection to the employment." Hawkes v. Commercial Union Ins. Co., No. Cum-00-229, 2001 WL 38286 at *4 (Me. Jan. 16, 2001) (internal quotations and citations omitted). Considering the facts as alleged by Plaintiffs, the Court concludes that Wood's injuries clearly originated with and were caused by her employment with ASI on August 23, 1998.

Based on the Law Court's decisions in Li, Searway and Hawkes, the Court concludes that certification of Plaintiffs' proposed questions in unnecessary. See Marbucco Corp. v. Suffolk Constr. Co., 165 F.3d 103, 105 (1st Cir. 1999) ("It is inappropriate, however, to use certification 'when the course state courts would take is reasonably clear.'") (quoting Porter v. Nutter, 913 F.2d 37, 41 n. 4 (1st Cir. 1990)).

B. Defendant's Motion to Dismiss

In light of the Law Court decisions discussed above, Defendant argues that Plaintiffs' claims for battery (Count I), intentional infliction of emotional distress (Count II), fraud (Count III), breach of employment contract (Count IV), declaratory judgment (Count V), breach of Navy contract (Count VI), loss of consortium (Count VII), and punitive damages (Count VIII) should be dismissed. In support of its motion, Defendant points to the exclusivity provision of the MWCA, which states, in relevant part:

> an employee of an employer who has secured payment of compensation as provided in sections 401 to 407 is deemed to have waived the employee's right of actions at common law and under section 104 to recover damages for injuries sustained by the employee.

39-A M.R.S.A. § 408. This waiver generally applies to all civil actions for "personal injuries sustained by an employee arising out of and in the course of employment or for death resulting from those injuries." See id. § 104.

The Law Court has clearly interpreted the exclusivity provision to bar claims alleging intentional torts. See Cole v. Chandler, 752 A.2d 1189, 1195 (Me. 2000) ("We have refused to carve out an exception [to the MWCA] for intentional torts.") (citing Li v. C.N. Brown Co., 645 A.2d 606 (Me. 1994)). Thus, it appears that all of Plaintiffs' claims, which are based upon injuries for which Wood has already received workers' compensation benefits, are barred by the exclusivity and immunity provisions of Maine's Workers' Compensation Act. See 39-A M.R.S.A. §§ 104 & 408.

In response to Defendant's Motion, Plaintiffs argue that an employer who commits egregious intentional torts should not receive the limited liability benefit of the Maine Workers' Compensation Act. Plaintiffs raise concerns that under these circumstances the immunity from common law claims condones the employer's

egregious behavior. However, as the Law Court has pointed out, "[c]riminal sanctions are available when an employer's behavior is egregious."[1] Li, 645 A.2d at 608. Moreover, the Law Court has repeatedly said that to the extent that exemptions to the MWCA's exclusivity and immunity provisions are needed, "[t]he creation of such an exemption … is best left to the legislature." Id.

Therefore, based on the current state of the law, the Court concludes the Plaintiffs' claims are, in fact, barred by the immunity and exclusivity provisions of Maine's Workers' Compensation Act. See 39-A M.R.S.A §§ 104 & 408.

## IV. CONCLUSION

For these reasons, the Court hereby DENIES Plaintiffs' Motion to Certify and GRANTS Defendant's Motion to Dismiss. Thus, Plaintiffs' claims against the Defendant shall be DISMISSED in their entirety.

SO ORDERED.

George Z. Singal
District Judge

Dated on this 29th day of January, 2001.

PAMELA WOOD
plaintiff

RALPH A. DYER, ESQ.
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[1] In this case, the violations and fines imposed by OSHA serve as an additional liability for Abhe & Svoboda's conduct related to the August 23rd accident.

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GLENROY WOOD — RALPH A. DYER, ESQ.
plaintiff — (See above)
[COR LD NTC]

v.

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